STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ALLAN WASHINGTON, Defendant-Appellant.	FOR PUBLICATION May 31, 2002 9:20 a.m. No. 221851 Wayne Circuit Court LC No. 98-006098 Updated Copy August 30, 2002

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to a term of six to fifteen years for the armed robbery conviction and a term of six to ten years for the assault conviction, the sentences to run concurrently. Defendant appeals as of right. We reverse and remand for a new trial.

I. Basic Facts and Procedural History

During the late evening hours of May 7, 1998, the victim was shot and robbed by two men. His watch, pager, and $71 were taken. The first officer responding to the scene broadcast a description of the perpetrators over the air to other police officers.

Approximately five minutes later, two other police officers, at this time unaware of the shooting, observed defendant and his cousin, Daniel Mathis, pull into an alley behind a gas station. Because the area is known for drug and prostitution activities, they approached the vehicle. As one officer approached the driver's side of the vehicle, defendant left the vehicle and walked into the gas station. According to the testimony adduced at trial, when defendant did not respond to the officer's verbal commands to stop, the officer followed defendant into the gas station and promptly returned him to the vehicle. The officer indicated that when defendant unsuccessfully attempted to start the vehicle, defendant was physically removed from the car.

According to the officers, defendant resisted, and both officers subdued defendant, handcuffed him, and placed him in the rear of the police cruiser.

As the defendant was being subdued, the officers heard the broadcast concerning the shooting over the police radio. As the officers listened to the description of the perpetrators, Mr. Mathis, who was detained in the passenger seat of the defendant's vehicle, blurted out: "I did it—I'm the shooter". Defendant and Mathis were arrested and placed together in a lineup. At the lineup, the victim identified defendant as one of the perpetrators, but did not identify the codefendant, Mathis. No gun, bullets, pager, or watch were recovered from either defendant or the vehicle.

Before trial, defense counsel filed a motion for a separate trial, or alternatively for a separate jury, on the ground that defense counsel believed the prosecution would attempt to introduce codefendant Mathis' statement identifying himself as the shooter. During the final conference, the trial court indicated that it would grant defendant's motion for separate juries, but did not address the issue of the statement.

On the first day of trial, the prosecutor raised the issue of introducing Mathis' statement as substantive evidence against defendant on the grounds that the statement was against codefendant's penal interest and did not otherwise inculpate defendant. In response, defense counsel indicated that codefendant was previously diagnosed as mentally ill and had a history of psychological disturbances requiring psychiatric treatment. Thus, defense counsel argued that there was an issue pertaining to codefendant's competency. Additionally, defense counsel argued that admitting the statement against defendant in defendant's trial would unfairly prejudice defendant. Despite defense counsel's arguments, the trial court ruled that it would permit the statement to come in as substantive evidence against defendant.

On the third day of trial, defendant brought suspected juror misconduct to the court's attention. Defendant indicated that a juror went to lunch with and drove with a police officer who was present during the first two days of trial. The police officer was also alleged to have had contacts with the victim or his family. Although the court questioned the juror, it did not permit defense counsel to conduct a voir dire of the juror or to present a potential witness to the alleged misconduct.

The jury convicted defendant. We now reverse and remand for a new trial.

II. Admissibility of Codefendant Mathis' Statement

Defendant argues that the trial court erred in admitting codefendant's statement identifying himself as the perpetrator. We agree.

This court reviews decisions regarding the admissibility of evidence for an abuse of discretion. *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed do novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Similarly, because this issue implicates the Confrontation Clauses[1] of the state and federal constitutions, the issue is constitutional and is reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

In the instant matter, the prosecution introduced in defendant's trial as substantive evidence of defendant's guilt an out-of-court statement made by a codefendant. As the Court in *People v Richardson*, 204 Mich App 71, 73-74; 514 NW2d 503 (1994), quoting *People v Petros*, 198 Mich App 401, 409; 499 NW2d 784 (1993), observed:

> "The admissibility of a nontestifying codefendant's inculpatory statement as substantive evidence presents two distinct but related issues. The first is the status of the proffered evidence as hearsay. The second is the concern that admitting such testimony will violate the defendant's right 'to be confronted with the witnesses against him.'" [Citations omitted.]

Codefendant's statement identifying himself as the perpetrator of the shooting incident is indeed an unsworn out-of-court statement offered to prove the truth of its assertion. On appeal, the prosecution contends that the statement was not offered to prove that codefendant was actually the shooter but rather, to establish a justification for the officers' conduct in arresting defendant and placing him in a lineup for purposes of identification. We do not agree.

A review of the record indicates that the introduction of codefendant's statement identifying himself as the perpetrator was offered to prove that he *actually* perpetrated the crime. Because codefendant was a passenger in the defendant's vehicle five minutes after the shooting occurred, the admission of the statement leads to the inescapable conclusion that defendant was an accomplice to the shooting. Because the statement was offered to prove the truth of its assertion, the statement constitutes hearsay. *People v Poole*, 444 Mich 151, 158-159; 506 NW2d 505 (1993). Hearsay is inadmissible unless there is a specific exception allowing for its introduction. *People v Ivers*, 459 Mich 320, 331 (Boyle, J., concurring); 587 NW2d 10 (1998).

The prosecution suggests that the statement is a statement wholly against codefendant's penal interest and thus admissible pursuant to MRE 804(b)(3). Indeed it would be difficult to imagine a statement more against one's penal interest than a statement admitting guilt. Because codefendant's statement identifying himself as the shooter is a statement that implicates the

[1] US Const, Am VI; Const 1963, art I, § 20.

declarant himself, it clearly comes within the purview of MRE 804(b)(3). See *Richardson, supra* at 76. This, however, does not end our inquiry.

Here, the prosecution introduced the statement as substantive evidence of *defendant's* guilt in *defendant's* trial without any opportunity for cross-examination. As our Supreme Court aptly stated, the "'truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination.'" *People v Watkins*, 438 Mich 627, 656; 475 NW2d 727 (1991), quoting *Lee v Illinois*, 476 US 530, 541; 106 S Ct 2056; 90 L Ed 2d 514 (1986) (emphasis omitted). Indeed, "the principal protection provided by the Confrontation Clause to a criminal defendant is the right to conduct cross-examination," *People v Gearns*, 457 Mich 170, 186; 577 NW2d 422 (1998), to ensure that "'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement,'" *Petros*, *supra* at 418, quoting *Dutton v Evans*, 400 US 74, 89; 91 S Ct 210; 27 L Ed 2d 213 (1970).

Because counsel on behalf of codefendant appeared and indicated that he would assert his client's Fifth Amendment privilege if codefendant were called upon to testify, defendant's constitutional right to confrontation was implicated and the otherwise hearsay statement could not come in as substantive evidence unless the statement "falls within a firmly rooted hearsay exception or if it bears adequate indicia of reliability." *Schutte*, *supra* at 717-718.

The issue presented in the case sub judice is whether codefendant's statement contains sufficient "particularized guarantees of trustworthiness" considering the totality of the circumstances surrounding its utterance to justify its admission. See *Schutte, supra* at 719, quoting *Poole, supra* at 165 ("'[T]he totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant.'"). On the record here before us, we find that it does not.

A review of the record reveals an assertion by defense counsel that codefendant Mathis suffered from mental illness and that he had a history of psychiatric and psychological treatment. Certainly, an inculpatory statement made by a mentally ill codefendant that tacitly inculpates defendant as his accomplice is not a statement that contains "particularized guarantees of trustworthiness" sufficient to introduce the statement as substantive evidence against defendant without the opportunity for cross-examination. Permitting codefendant's statement to come in as substantive evidence against defendant, while depriving defendant the opportunity to challenge that statement through the adversarial process, violates the bedrock principles underlying the Confrontation Clause itself. Indeed, "'the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.'" *Gearns, supra* at 186, quoting *Delaware v Fensterer*, 474 US 15, 22; 106 S Ct 292; 88 L Ed 2d 15 (1985) (emphasis omitted).

The trial court's admission of codefendant's inculpatory statement as substantive evidence against defendant without providing defendant any opportunity to challenge the statement through cross-examination is not harmless error. Based on the evidence presented at trial, it is more probable than not that a different outcome would have resulted without the admission of codefendant's statement.

On appeal, the prosecution asserts that defendant ran from the police officers, but neither the testimony of defendant nor the officers supports this assertion. Also, the prosecution contends that defendant tried to drive away. However, the testimony of the officers actually indicates that the car was never started and that they were not even sure if defendant attempted to insert the keys into the ignition. Furthermore, defendant was alleged to have stolen $71, but, when apprehended, he had over $500 on his person. Neither he nor codefendant had a gun, the stolen pager, the stolen watch, and these items were not found in the car in which they were traveling. The fact that defendant was found within minutes of the robbery within one mile of the crime scene does not tend to establish his guilt any more than any other person who lives in the area and was also at the gas station at the same time. Finally, the description the victim gave to the police was "quite vague" and did not match either the defendant or codefendant.

Although we acknowledge the victim identified defendant in a lineup, we do not believe this, standing alone, clothes the codefendant's statement with "adequate indicia of reliability." The lineup was conducted ten days after the robbery and after the victim had been sedated and medicated in the hospital for five days. The victim identified the defendant as the man who shot him, but defendant was tried as the accomplice of the shooter. In addition, the victim did not identify the codefendant.

As we noted in *People v Spinks*, 206 Mich App 488, 493; 522 NW2d 875 (1994), quoting *People v Banks*, 438 Mich 408, 430; 475 NW2d 769 (1991), if the ""minds of an average jury" would have found the prosecution's case "significantly less persuasive" had the statement of the [accomplice] been excluded,'" then the error is not harmless. Considering that codefendant' statement is the only concrete evidence linking defendant to the crime for which he now stands convicted, we find that had the statement been properly excluded, the prosecution's case would have been significantly less persuasive in "the minds of an average jury". Accordingly, we find that the trial court abused its discretion by admitting the statement.

III. Midtrial Voir Dire

Defendant next argues that the trial court erred in not allowing defense counsel an opportunity to question a juror about contact with an individual who had been present during testimony and who may have had contact with the victim or his family. We agree. A trial court's decision whether to conduct a midtrial voir dire is reviewed for abuse of discretion. *People v Adams*, 245 Mich App 226, 240-241; 627 NW2d 623 (2001). An abuse of discretion obtains where "an unprejudiced person, considering the facts on which the trial court acted, would say

there was no justification or excuse for the ruling." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1 § 20. A defendant is entitled to relief from a verdict when information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn if the defendant can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause. *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998), citing *People v Hannum*, 362 Mich 660, 666-667; 107 NW2d 894 (1961), and *People v DeHaven*, 321 Mich 327, 330-334; 32 NW2d 468 (1948).

In this case, defense counsel requested the opportunity to question a juror because he had reason to suspect juror misconduct. He presented the trial court with the facts underlying this suspicion and presented a witness to corroborate the alleged misconduct. The trial court refused to allow the witness to speak and denied defense counsel's request to question the juror himself. On these facts, we find the trial court abused its discretion in refusing to question, or in not allowing defense counsel the opportunity to question, the juror about the alleged misconduct.

IV. Ineffective Assistance of Counsel

Although the resolution of the previous issues does not require us to address the remaining issue raised by defendant on appeal, we do, however, comment upon defendant's claim for ineffective assistance of counsel. We note that a review of the complete record reveals that trial counsel for defendant did provide effective assistance on defendant's behalf despite unfavorable rulings from the trial court. Trial counsel thus fulfilled his ethical and professional duty to zealously advocate the interests of his client within the bounds of the law. To impugn trial counsel's performance on the record contained in the instant matter precariously teeters on the edge of frivolity.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Harold Hood